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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JAMES HOSTON,

Appellant,

vs.

THE J. R. WATKINS COMPANY, a corporation, aka WATKINS PRODUCTS, INC., a corporation,

Appellee.

NO. 17424

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

VAUGHN AND MORROW
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FILED

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STATEMENT OF THE CASE

This is an appeal from a judgment for defendant appellee, THE J. R. WATKINS COMPANY, a corporation, entered by the United States District Court for the Southern District of California, Central Division, based upon the granting of a motion made by appellee for summary judgment.

SUMMARY OF MATERIAL FACTS

WILLIAM JAMES HOSTON filed a verified complaint for damages, accounting, and declaratory relief in the United States District Court for the Southern District of California, Central Division, on November 15, 1960. Said complaint alleged in sum and substance that appellant entered into an oral agreement with the appellee for an exclusive distributorship in an exclusive territory located in the County of Los Angeles, State of California, in an area commonly known as the San Fernando Valley.

Appellant further alleged in said complaint that he expended certain sums in order to comply with the requirements of appellee with reference to the establishment of the exclusive distributorship in said exclusive territory and that appellee breached the agreement with appellant. As a result of said breach of agreement, appellant was damaged in the respective sums set forth in the complaint. The oral agreement that appellant entered into with appellee was alleged to be as follows:

That appellant devote his entire time, labor and best effort to the promotion and sale of the line of products known as "Watkins Products" as a distributor of Watkins products at appellee's designated wholesale prices. Said contract further provided that plaintiff distribute the Watkins products in an area of Los Angeles County known as the San Fernando Valley, and so long as plaintiff was a distributor in said designated territory appellee would create no new or allow to exist any other distributor. Said contract also provided that appellant was to secure and maintain at appellant's expense a fully equipped and appointed office approved by appellee as to its location, type, equipment and appointments. Said office was to be of such caliber as to give the impression to the public of a highly successful business and which was attractive to the public and which would be a distinct credit to the appellee; that said office was to bear the name of the appellee

and in every manner convey the impression that appellee was doing business from its location. Said contract provided that appellant was to recruit and train a sales staff whose job was to sell at retail prices appellee's products to consumers from door to door, or on an individual basis. All of said training program, cost of recruiting and "plush" office, was according to said oral agreement to be at appellant's cost and expense, and appellant promised to hold appellee harmless with reference to any charge or liability connected therewith. Said agreement also provided that appellant was to refrain from selling, handling or distributing any products not distributed to appellant by appellee and that appellant was to handle exclusively merchandise distributed to appellant by appellee. That said agreement further provided that appellee would supply appellant sales quotas for designated periods of a week, month, quarter, and year, and that appellant was to maintain a dollar sales volume in accordance with said quota requirements. In return for appellant's promise of performance and performance as herein above set forth, said agreement provided that appellee sell its line of products to appellant at appellee's wholesale prices, less a discount of twenty-seven and one-half percent (27½%). Said agreement further provided that appellant was to furnish a bond by surety of Five Thousand Dollars ($5,000.00) and that said agreement was to exist for one year with option to renew on the part of appellant for a

year, on a year-to-year basis thereafter provided that appellant had satisfactorily performed by maintaining the prescribed office, recruiting and training the necessary personnel, and meeting the prescribed sales quota. Said agreement further provided that said option to renew could be terminated upon reasonable notice in writing. Said agreement further provided that a part of said oral agreement was to be reduced to writing upon the expressed understanding of the parties that said writing was for the purpose of providing a protection for appellee against appellant by a third party, so that as between appellee and said third party, the relationship of appellee and appellant would be that of vendor and purchaser, the appellee described as the vendor and the appellant as the purchaser, and said written agreement was to provide for the sale of appellee's products to appellant at appellee's wholesale prices was 27½% discount. That upon the termination of the vendor and purchaser relationship, that any merchandise in possession of the appellant could be returned to appellee and appellant would receive a credit for any amount due appellee by appellant. Said complaint further alleged that WILLIAM JAMES HOSTON was a resident of the County of Los Angeles, State of California, and appellee The J. R. WATKINS COMPANY, was a Delaware corporation and that its principle place of business was in Winona, Minnesota.

Said complaint further alleged that in performance of said oral agreement, appellant was to invest from $3,500.00

to $5,000.00 in the period of one year and that appellant would keep on hand the merchandise in excess of appellant's immediate need of not in excess of $5,000.00 in order to properly promote the sale of said Watkins products.

The complaint further alleged that appellant performed said oral agreement in each and every particular and did invest the sum of $4,380.00 in accordance with said oral agreement August 29, 1957, and December 27, 1958.

Said complaint further alleged that on August 29, 1958, appellee renewed appellant's option as provided for in said agreement, and appellant continued to perform as aforesaid until December 27, 1958, at which time and before the expiration of one year, the appellee without just or reasonable cause and without any prior notice did orally inform appellant that appellee would not deliver any more merchandise to appellant after said date; and demanded that appellant execute a resignation and also transfer his furniture, fixtures, and merchandise to a Cletus Reiter. Appellant refused to resign or make said transfer. On January 6, 1959, appellee sent a letter to appellant notifying appellant that the distributor agreement was terminated, effective January 9, 1959.

The complaint also alleged that appellant attempted to learn from appellee the reason for appellee's unreasonable conduct. Appellee refused and failed to state any reason for appellee's action. Appellee solicited

directly each sales person recruited and trained by appellant and by false and untrue representation that appellee had resigned from the distribution of Watkins products and had terminated said agreement causedsaid sales personnel to become the sales staff of said Cletus Reiter. Said complaint further set forth that appellant was unable to obtain any Watkins products and appellee appropriated to its own uses and retained unto itself, without compensating appellant, all the result of appellant's labor and work performed at the special instance and request of appellee, including appellant's promotional activity, appellant's sales staff of 200 persons, and the reputation and goodwill acquired by appellee through appellant's work and labor, and the investment in money as hereinabove set forth. Said complaint further alleged that appellant demanded that appellee furnish appellant with a statement of the items of merchandise by name and the wholesale purchase price of each item so that appellant would no whether or not appellee's claim of indebtedness to appellee in the sum of $2,151.27 by appellant was true and correct. The complaint alleged that appellee refused said request and to render an accounting of the items received and those which were not present among the merchandise turned over to appellee by appellant. The complaint further alleged that appellant denies that he owed the sum of $2,151.27 to appellee.

Appellee answered said complaint and denies the

existence of said oral agreement, the performance of said oral agreement by appellant, and alleged affirmatively in sum and substance that appellant and appellee executed a contract, Exhibit 'B', attached to appellee's answer providing for the sale to appellant by appellee of appellee's merchandise at wholesale prices less 27½%, that provided appellee was to furnish appellant all of appellee's goods reasonably required by appellant, provided that either party could terminate the agreement by giving notice thereof in writing, and that the relationship between the parties was that of vendor and purchaser and this Exhibit 'B' constituted the only contract between the parties.

Appellee moved the Court for a summary judgment and in support its motion filed its affidavit made by Alfred J. Smallberg, attorney at law for appellee, which affidavit insofar as it refers to the matters alleged in the complaint and denies in the answer, refers only to the matters with which appellant sought an accounting of and the merchandise returned to appellee after its termination of the distributorship agreement. It further in this regard states that appellant admitted in his deposition the correctness of this alleged account.

The depositions of appellant WILLIAM JAMES HOSTON, and JOHN FRANCIS THRUNE, an agent for defendant in control of all of appellee's California operation. LAWRENCE LYTLE WATKINS another agent for appellee and the district

supervisor envolved these depositions were taken and were before the Court at the time it granted appellee's motion for summary judgment. In response to appellee's motion for summary judgment, appellant submitted its pre-trial statement and memorandum of points and authorities and orally opposed said motion.

The Court made findings of fact that in substance were based upon appellee's affidavit, the depositions, and the pleadings, that the only agreement between the parties was Exhibit 'B' to the answer of appellee.

ARGUMENT

POINT I

THE COURT ERRED IN SUSTAINING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

In considering a motion for summary judgment, the pleadings are to be liberally construed in favor of the party opposing the motion and the Court must take the view most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences that may be drawn from the evidence.

McHenry v. Ford Motor Co., CA Mich., 1959,
269 F 2d 18

On a motion for summary judgment, the pleadings of the opposing party must be taken as true, unless by the admissions, deposition or other material introduced, it appears beyond controversy otherwise.

Hurn vs. St. Paul Mercury Indemn. Co., 1959,

CA La. 262 F 2d 526

All doubt as to whether a motion for summary judgment should be granted should be resolved against the movant.

Booth vs. Barber Transp. Co., CA Neb. 1958,

256 F 2d 927

Snyder vs. Hillegeist, CA 1957, 246 F 2d 649,

106 U.S. App. D.C. 360

A court is not at liberty to engage in a creditability evaluation for the purposes of a summary judgment.

Johnson Farm Equipment Co. vs. Cook, 1956

CA 230 F 2d 119

Coe vs. Riley, CCA Fla 1947, 160 F 2d 538

In Gerard vs. Gill, C.A. N.C., 1958, 261 F 2d 695, it was held that conflicts and ambiguities are not to be resolved on motions for summary judgments and neither is the trial Court at liberty to choose between conflicting inferences. The function of a motion for summary judgment is not to permit the Court to decide issues of fact but solely to determine whether there is an issue of fact to be tried.

Aetna Ins. Co. v. Cooper Weels & Co., 1956,

C.A. Mich, 234 F 2d 342

Coylar vs. Virden, 1955, C.A. Mo., 217 F 2d 739

A summary judgment should not be used as a substitute for trial on facts and law, especially where the parties

are entitled to trial by jury, and the mere fact that the trial Judge believes that the plaintiff cannot win his lawsuit before a jury does not endow him with authority to take the place of a jury and to decide lengthy contested issues of fact.

Cox vs. English-American Underwriters, CA (Cal.) 1957, 245 F 2d 330.

The law of California should determine whether a triable issue of fact exist under the pleadings and depositions.

Kruger vs. Ownership Corp, 1959, C.A. N.J., 270 F 2d 265

The presence of a single genuine issue as to a material prejudices disposition of a case by summary judgment and it may not be rendered.

Cee Bee Chemical Co. vs. Delco Chemicals, Inc., 1959, 263 F 2d 150.

Hoffritz v. U. S., 1956, CA Cal. 240 F 2d 109

A substantial dispute of a material fact is the test required to be used in determining the propriety of granting a summary judgment.

Guerriro vs. American-Hawaii, 1955, SS Co. CA. Cal., 222 F 2d 236.

The decision in the case at bar is in violation of each of the precepts outlined above and ignores directly in the rule layed down for the Court itself in the case of

Williams vs. Minnesota Min. & Mfg. Co., 1953, D.C., Cal. 14 FRD 1 when the Court said that where inconsistency between affidavits for support of summary judgment and the complaint raises issues of fact, the Federal District Court may not resolve the conflict on a motion for summary judgment.

POINT II

THE AFFIDAVIT OF APPELLEE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DID NOT COMPLY WITH RULE 56, FEDERAL RULES.

The affidavit filed by appellee is wholly insufficient because it does not comply with Rule 56 (e) in that it is not made by a person who has personal knowledge of the facts alleged in the complaint and denied in the answer; and it is of the type of affidavit which the Court held wholly insufficient in Cornecchio vs. Conegilio, 1947, NC. N.Y. 7 FRD 749, where the Court said that an affidavit by an attorney ordinarily insufficient because he has no personal knowledge of the facts. Essentially, the affidavit of Smallberg is the same as that which was striken in Porter vs. American Tobbacco, 1946 DC. (N.Y.), 7 FRD 106, where the Court held that while it was proper to summarize in an affidavit the facts, it was improper in an affidavit to make an argument. Essentially, this is what Smallberg's affidavit is: an argument.

POINT III

THE COMPLAINT AND THE ANSWER TENDER SIX ISSUES OF FACT.

The issues of fact tendered by the complaint and the denial of the answer are as follows:

1) Whether there existed an oral contract as set forth in the complaint or whether the document marked Exhibit 'B' attached to appellee's answer and counterclaim is the only agreement between the parties?

2) If the oral agreement set forth in complainant's complaint is valid and subsisting as between the parties, did defendant breach said agreement by their conduct as is alleged in the complaint?

3) If Exhibit "B" attached to appelle's answer is the only agreement between appellant and appellee, since Exhibit "B" was dated August 29, 1957, and renewed in August of 1958? Did appellee have the right under said agreement to refuse to honor that agreement as of December, 1958, and to give notice of termination orally in December and by writing in January, 1959?

4) Is appellant entitled to a statement from appellee setting forth the names of the items claimed to be unpaid for and the wholesale purchase price of each of said items.

5) Is appellant indebted to appellee in the sum of $2,151.27?

The law of California with respect to contracts of the nature and extend here involved is that: first where one party claims that the agreement was oral and then reduced to writing, as appellee claims, a determination must be made with respect to whether or not the writing is in fact an intergrated agreement, and if it is an intergrated agreement, then 'parol evidence is admissable to show that the purported writing was sham or artifice, or that it is existent as a contract was dependent upon some condition not inconsistent with the terms thereof'. Parol evidence may be offered 'to show that the parties executed the contract for some extrinsic purpose such as sham or artifice or that it was intended for some purpose other than to set forth their respective rights and obligations.' Parol evidence may also be received 'to show extrinsic condition upon which the effectiveness of the writing depended'.

Parker vs. Meneley, 1951, 106 CA 2d 391, 235 P 2d 107

Code of Civil Procedure of the State of California, Section 1856, Section 1860, Section 1625.

The affidavit of Smallberg in support of motion for summary judgment does not touch upon any of these issues and the deposition of WILLIAM JAMES HOSTON shows his testimony

in full with reference to said oral agreement and the depositions of THURNE and WATKINS only go sufficiently as far to admit that oral conversation along the lines of appellant's oral agreement did take place.

In Aaron Ferer & Sons vs. Richfield Oil Corp, 1945 150 F 2d 12, the 9th Circuit held that where plaintiff files an affidavit denying a prior agreement between the parties and alleges that the pleaded agreement was the only one made and seeks a summary judgment thereon, and defendant files affidavits creat a genuine issue as to a material fact requiring the usual trial by witnesses subject to cross examination and the District Court should have denied a motion for summary judgment. That Aaron Ferrer & Sons Case is quite similar to the case at bar in that plaintiff's verified complaint is in fact insofar as it alleges facts, a sworn affidavit opposed by the verified denial of defendant, another sworn affidavit, which under said status creats a genuine issue of fact to be tried.

It appears from the findings of fact that the District Court of Appeals made a determination as a matter of law that in fact there was no oral agreement. While the Aaron & Sons Case, supra, dealt specifically with the question of reformation of an agreement, it is a kin to the case at bar because both of the cases involve the existence or non-existence of an oral agreement. In view of the law set forth in plaintiff's memorandum of points and authorities filed in the

District Court pursuant to Rule 9, Page 76 through 87 of Transcript of Record, there is no question that if plaintiff proves the allegations of his complaint, plaintiff is entitled to judgment.

The District Court in its findings of fact and conclusions of law made no findings whatever with reference to whether or not appellant was entitled to an accounting of the kind set forth as requested in the complaint. It made no finding with respect to whether or not the oral agreement as alleged in the complaint was in fact executed or not executed by appellant, it made no finding with respect to whether or not appellee had the right to terminate the agreement it found to exist after it had existed for six months, and the District Court made no finding with respect to whether or not Exhibit "B" attached to defendant's answer was or was not a valid enforceable contract. It is submitted that the District Court made no findings on these issues because it had no evidence before it on these issues except the allegation of fact in the complaint and the denial of defendant. This failure on the part of the District Court, itself, evidences the confusion with which the District Court approached the problems raised by the pleadings in this case.

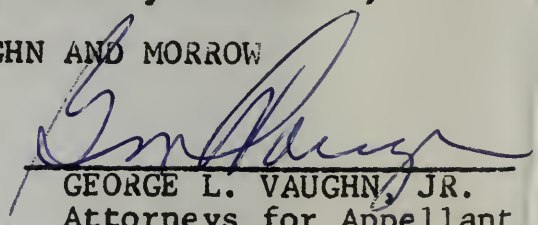
CONCLUSIONS

The judgment in favor of defendant based upon the granting of the motion for summary judgment should be

reversed. It is patent from the status of the record that the first issue tendered by the pleading is the existence or non-existence of an oral agreement; and even though the Court might hold that no agreement existed, there is still the issue of whether or not the defendant had a right to terminate his relationship with plaintiff completely after it had renewed its agreement. The cases set forth in appellant's memorandum of points and authorities reported in the transcript of record on appeal at Page 71 and incorporated herein by reference, clearly show that all of the issues in this case are ones of fact, except the issue with reference to the interpretation of Exhibit "B" to defendant's answer in determing whether it is in fact an enforceable agreement or whether it is simply an illusary writing.

Respectfully submitted,

VAUGHN AND MORROW

BY: 

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